



AC Ref: 08TACD2016

NAME REDACTED

Appellant

V

REVENUE COMMISSIONERS

Respondent

DETERMINATION

Introduction

1. This case involves a hearing pursuant to section 933(1)(d)(iii) of the Taxes Consolidation Act 1997 as amended ('TCA 1997') to enable a determination by the Commissioners regarding the issue of whether to allow an application for an appeal.
2. On 28 February 2011, an assessment was raised in respect of the Appellant in the absence of a return, regarding a capital gains tax ('CGT') liability in the sum of €343,898, in respect of the tax year of assessment 2004.
3. On or about February 2013 the parties entered into a settlement agreement ('the agreement') pursuant to section 933(3) TCA 1997. Pursuant to the agreement the Respondent accepted that the return had been filed and the CGT paid under the tax reference number of the Appellant, NAME REDACTED (Ref no. REDACTED), a trustee of the NAME REDACTED Settlement. The assessment dated 28 February 2011 was reduced to nil in accordance with the agreement pursuant to section 933(3) TCA 1997.
4. The Appellant subsequently claimed that the consequence of reducing the assessment to nil was that a repayment claim arose in respect of the CGT previously paid on behalf of the



NAME REDACTED Settlement in accordance with section s.864(1)(b) TCA 1997. The Appellant, in its capacity as trustee of the NAME REDACTED Settlement, sought that the alleged repayment be offset against liabilities of the NAME REDACTED Settlement for 2010 and 2011. The Respondent declined this request and further correspondence ensued culminating in this hearing pursuant to section 933(1)(d) TCA 1997.

Legislation

Section 933 Appeals against assessment

(1) (a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.

(b) Where on an application under paragraph (a) the inspector or other officer is of the opinion that the person who has given the notice of appeal is not entitled to make such an appeal, the inspector or other officer shall refuse the application and notify the person in writing accordingly, specifying the grounds for such refusal.

(c) A person who has had an application under paragraph (a) refused by the inspector or other officer shall be entitled to appeal against such refusal by notice in writing to the Appeal Commissioners within 15 days of the date of issue by the inspector or other officer of the notice of refusal.

(d) On receipt of an application under paragraph (c), the Appeal Commissioners shall request the inspector or other officer to furnish them with a copy of the notice issued to the person under paragraph (b) and, on receipt of the copy of the notice, they shall as soon as possible-

(i) refuse the application for an appeal by giving notice in writing to the applicant specifying the grounds for their refusal,



(ii) allow the application for an appeal and give notice in writing accordingly to both the applicant and the inspector or other officer, or

(iii) notify in writing both the applicant and the inspector or other officer that they have decided to arrange a hearing at such time and place specified in the notice to enable them determine whether or not to allow the application for an appeal.

.....

.....

(3) (a) This subsection shall apply to any assessment in respect of which notice of appeal has been given, not being an assessment the appeal against which has been determined by the Appeal Commissioners or which has become final and conclusive under subsection (6).

(b) Where, in relation to an assessment to which this subsection applies, the inspector or other officer and the appellant come to an agreement, whether in writing or otherwise, that the assessment is to stand, is to be amended in a particular manner or is to be discharged or cancelled, the inspector or other officer shall give effect to the agreement and thereupon, if the agreement is that the assessment is to stand or is to be amended, the assessment or the amended assessment, as the case may be, shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given.

(c) An agreement which is not in writing shall be deemed not to be an agreement for the purposes of paragraph (b) unless-

the fact that an agreement was come to, and the terms agreed on, are confirmed by notice in writing given by the inspector or other officer to the appellant or by the appellant to the inspector or other officer, and

(ii) 21 days have elapsed since the giving of that notice without the person to whom it was given giving notice in writing to the person by whom it was given that the first-mentioned person desires to repudiate or withdraw from the agreement.



(d) Where an appellant desires not to proceed with the appeal against an assessment to which this subsection applies and gives notice in writing to that effect to the inspector or other officer, paragraph (b) shall apply as if the appellant and the inspector or other officer had, on the appellant's notice being received, come to an agreement in writing that the assessment should stand.

(e) References in this subsection to an agreement being come to with an appellant and the giving of notice to or by an appellant include references to an agreement being come to with, and the giving of notice to or by, a person acting on behalf of the appellant in relation to the appeal.

.....

Section 949 Appeals against determinations of certain claims, etc

(1) Any person aggrieved by any determination by the Revenue Commissioners, or such officer of the Revenue Commissioners (including an inspector) as they may have authorised in that behalf, on any claim, matter or question referred to in section 864 may, subject to section 957 and on giving notice in writing to the Revenue Commissioners or the officer within 30 days after notification to the person aggrieved of the determination, appeal to the Appeal Commissioners.

(2) The Appeal Commissioners shall hear and determine an appeal to them under subsection (1) as if it were an appeal against an assessment to income tax and then provisions of section 933 with respect to such appeals, together with the provisions of the Tax Acts relating to the rehearing of an appeal and to the statement of a case for the opinion of the High Court on a point of law, shall apply accordingly with any necessary modifications.'

Section 865 Repayment of tax

.....

(4) Subject to subsection (5), a claim for repayment of tax under the Acts for any chargeable period shall not be allowed unless it is made –



(a) in the case of claims made on or before 31 December 2004, under any provision of the Acts other than subsection (2), in relation to any chargeable period ending on or before 31 December 2002, within 10 years,

(b) in the case of claims made on or after 1 January 2005 in relation to any chargeable period referred to in paragraph (a), within 4 years, and

(c) in the case of claims made –

(i) under subsection (2) and not under any other provision of the Acts, or

(ii) in relation to any chargeable period beginning on or after 1 January 2003,

within 4 years,

after the end of the chargeable period to which the claim relates.

Agreement pursuant to section 933(3) TCA 1997

5. Pursuant to section 933(3) TCA 1997, an appeal may be determined by agreement between the taxpayer and an Inspector or other officer of the Revenue Commissioners.
6. In this case, a CGT assessment in respect of the NAME REDACTED Settlement was raised by the Respondent on 28 Feb 2011. The assessment was raised on the basis that the return had not been submitted in respect of the tax year of assessment 2004 and the assessment thus included the applicable surcharge. A notice of appeal was filed by the Appellant in respect of this assessment on 7 March 2011.
7. Subsequent to the raising of the assessment, the Respondent was informed that the Appellant, trustee of the NAME REDACTED Settlement, had paid the CGT in 2004 and the return in respect of 2004 had been filed on 31 October 2005.



8. On 7 February 2013, the Respondent wrote to agents for the Appellant, *without prejudice*, proposing terms of settlement in accordance with s.933(3) TCA 1997. That e-mail provided;

"..... I am willing to accept that the returns in relation to Income Tax (Form 1) were submitted on the 31st of October 2005 (in relation to the 2004 return). I also understand the rationale for the Capital Gains Tax "CGT" return being filed by NAME REDACTED APPELLANT, on the basis that the NAME REDACTED Settlement did not have a registration number at the date of filing (5th of November 2004) and that NAME REDACTED APPELLANT was a trustee.

In the circumstances I am willing, subject to your client's agreement, to accept that the NAME REDACTED Settlement has delivered returns for the chargeable periods in question and has made in the returns a full and true disclosure of all the material facts necessary.

If your client is willing to agree to the proposed settlement above, I will, in accordance with Section 933(3)(b) TCA, reduce the assessment..... to CGT to nil."

The terms of the settlement can be summarised as follows ;

- the Respondent would accept that the NAME REDACTED Settlement filed its return in respect of 2004, on 31 October 2005
- the Respondent would accept that the sum of €343,898 paid by the Appellant was paid on behalf of the NAME REDACTED Settlement to discharge the 2004 CGT liability
- that in accordance with section 933(3)(b) TCA 1997, the Respondent would reduce the CGT assessment to nil and would vacate the then upcoming hearing date before the Appeal Commissioners.

9. On 11 Feb 2013 agents for the Appellant wrote to the Respondent stating;

'We refer to your email dated 7 February 2013 in connection with the above.



We are writing to confirm that our client agrees with your proposal to accept that the NAME REDACTED Settlement has made income tax returns (Form 1) at the times set out in your email (i.e. 18 November 2004 in relation to the 2003 return and 31 October 2005 in relation to the 2004 return). ‘

10. On 11 February 2013 the Respondent e-mailed agent for the Appellant stating;

‘We will reduce the assessments raised (which were made on the basis that the returns had not been submitted until February 2011.....) to nil. We will simultaneously put on a manual charge based on the amounts declared on the returns submitted, which we are now accepting were submitted on the 31st of October 2005 (in relation to the 2004 return). Since the tax was paid for the periods in question, this means the net liability for those periods is nil.’

11. On foot of the exchange of the correspondence the Respondent vacated the upcoming hearing date of 15 February 2013.

12. Pursuant to section 933(3) TCA 1997, an appeal may be determined by agreement between a taxpayer and an inspector as to the correct amount of tax to be charged. Where such an agreement is made, section 933(3)(b) provides that “*the assessment.... shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given*”. Based on the terms of settlement, as evidenced by the correspondence, it is clear that the CGT assessment raised was reduced to nil based on the agreement reached between the Appellant and the Respondent in accordance with section 933(3) TCA 1997 as set out pursuant to the parties’ written exchanges from 7 February 2013 to 11 February 2013.

13. Neither the Respondent nor the Appellant dispute the fact that it was a term of the agreement that the assessment dated 28 Feb 2011 would be reduced to nil and the imminent appeal in relation thereto would be vacated. However the Appellant subsequently claimed that the *consequence* of the agreement gave rise to a repayment claim pursuant to section 864(1)(b) TCA 1997. The Appellant contended that the €343,898 paid on behalf of the NAME REDACTED Settlement in respect of the tax year 2004 was repayable and that the



putative repayment should be offset against tax liabilities due by the NAME REDACTED Settlement for 2010 and 2011.

Claim for repayment pursuant to section 864(1)(b) TCA 1997

14. On 27 May 2013 the Appellant wrote to the Respondent seeking repayment pursuant to section 864(1)(b) TCA 1997 in respect of CGT paid for 2004. That letter provided; *"The tax paid of €343,898 under tax reference number REDACTED in 2004 is also available for offset..."*
15. On 28 May 2014 the Respondent set out its view that there was no basis for an offset. The letter provided;

"In my e-mail of 7th of February 2013, I accepted, as part of a settlement agreement, made in advance of a hearing before the Appeal Commissioners, that the NAME REDACTED Settlement had delivered all the relevant returns for the periods in question. This was on the basis that I accepted the relevant CGT was paid, all be it by NAME REDACTED APPELLANT on behalf of the NAME REDACTED Settlement. The explanation given for why the tax was paid by NAME REDACTED APPELLANT is that the NAME REDACTED Settlement did not have a registration at the time the tax was due and payable. In the interest of fairness and for the efficiency of settling the appeal I was willing to accept that the liabilities of the NAME REDACTED Settlement had been discharged (by virtue of the payment made on its behalf by NAME REDACTED APPELLANT.)

What you are requesting is that credit for the payment be given twice – firstly in respect of the original 2004 CGT liability and secondly by offsetting the amount against further tax liabilities of the NAME REDACTED Settlement.

There is no basis for the tax to be offset on this basis. I accepted, as part of the above settlement that the €343,898 paid by NAME REDACTED APPELLANT was paid to discharge the 2004 CGT liability of the NAME REDACTED Settlement. This amount is therefore not available for offset against any other liability."



16. The Appellant wrote to the Respondent on 10 June 2014 stating that the Appellant would treat the letter of 28 May 2014 as a determination pursuant to section 949 TCA 1997, and that the Appellant sought to appeal same. The Respondent formally refused the appeal pursuant to section 933(1)(b) TCA 1997 by letter dated 17 June 2014, notifying the Appellant that this refusal could be appealed pursuant to section 933(1)(c) TCA 1997. The Appellant duly appealed the refusal by letter dated 1 July 2014.

17. The reasons for the refusal of the appeal were set out in the Respondent's letter of 17 June 2014. The Respondent's position was that the agreement pursuant to section 933(3) TCA 1997 acknowledged discharge of the CGT liability on behalf of the NAME REDACTED Settlement during the tax year of assessment 2004 and that the assessment dated 28 February 2011 was reduced to nil pursuant to said agreement and in recognition of the discharge of the CGT liability. The Respondent refused the appeal because the Respondent took the view that in these circumstances, a claim for repayment pursuant to section 864 TCA 1997 could not arise.

Analysis

18. The purpose of the hearing in this matter is to enable the Commissioners to determine whether to allow the Appellant's application for an appeal which was refused by the Respondent by letter dated 17 June 2014, pursuant to section 933(1)(b) TCA 1997.

19. Pursuant to section 957(1)(b) TCA 1997, a taxpayer is not permitted to appeal an assessment to the extent that the assessment is based on the taxpayer's own return. However, in this case, the assessment dated 28 February 2011 was raised in the absence of a return. Where an assessment is raised in the absence of a return, any appeal in relation to same is limited to disputing the assessment to the extent that the assessment differs from amounts of tax agreed as due/payable or as contained in a return subsequently filed. A disagreement in these terms does not arise between the parties herein.



20. In this case the assessment dated 28 February 2011 was appealed on the basis that the tax alleged to be due and payable as per the assessment had previously been paid by the Appellant as trustee of the NAME REDACTED Settlement. The Respondent accepted that the tax had been paid and the return had been filed and thus reduced the assessment to nil.
21. The reduction to nil of the assessment took place with the acknowledgment and agreement of the Appellant and by the exercise of the requisite statutory power contained at section 933(3) TCA 1997. The matter in issue between the parties in this case is not the issue of the reduction of the assessment, but the consequence which the Appellant contends, arises therefrom.
22. At hearing the Appellant contended that the consequence of reducing the CGT assessment to nil was such as to give rise to a repayment of CGT in respect of the tax year of assessment 2004 which the Appellant then sought be offset against liabilities of the NAME REDACTED Settlement for 2010 and 2011.
23. In this case the parties made an agreement in writing pursuant to section 933(3) TCA 1997, the effect of which was to treat the assessment dated 28 Feb 2011 as if no notice of appeal had been filed in relation thereto. Pursuant to the terms of the settlement agreement between the parties, the assessment was reduced to nil and the hearing before the Appeal Commissioners, scheduled to be heard on 15 February 2013, vacated.
24. The exchange of correspondence in relation to the reduction of the assessment does not make reference to the position now adopted by the Appellant, namely, that the effect of same was such as to extinguish the 2004 CGT liability of the NAME REDACTED Settlement and give rise to a repayment claim in respect of CGT for 2004. The matter of this claim was raised for the first time on 27 May 2013. At hearing, no evidence was lead in support of the Appellant's contention and the Appellant was unable to cite any statutory basis for its contention.



25. I am aware, based on the correspondence in this case and the oral submissions at hearing that a refund was processed in favour of the Appellant under a separate tax head, in respect of the tax year 2004. That refund does not form part of this appeal and a submission as to parity or similarity of refund conditions or entitlement was not pursued at hearing.
26. In my view, as evidenced from the correspondence, an agreement was reached pursuant to section 933(3) TCA 1997 and the assessment of 28 Feb 2011 was reduced to nil in recognition of the fact that the Respondent recognised and accepted that the Appellant paid the 2004 CGT liability on behalf of the NAME REDACTED Settlement. The contention of the Appellant that the effect of the section 933(3) agreement was such as to give rise to a repayment of CGT in respect of 2004 is, in my view, unsubstantiated. The Appellant was unable to set out a statutory basis in support of this contention and the correspondence surrounding the section 933(3) agreement does not assist.
27. I do not accept as a matter of law that the reduction of the CGT assessment to nil in these circumstances had the effect of extinguishing the 2004 liability of the NAME REDACTED Settlement (which liability was discharged in 2005) or that the reduction of the assessment gave rise to a repayment of CGT (heretofore discharged) which could be applied by way of offset to tax liabilities of the NAME REDACTED Settlement for 2010 and 2011. In this case the liability to CGT and the discharge of same, occurred several years prior to the raising of the assessment. The reduction of the assessment to nil merely acknowledged that the CGT liability had previously been discharged and was no longer outstanding. In addition I note that the 4 year statutory time limit pursuant to section 865(4) TCA 1997 which would apply to a repayment claim per section 864(1)(b) TCA 1997 means that even if a repayment claim did arise, time expired for claiming a repayment of this tax on 31 December 2008.
28. In my view the Appellant has failed to put forward a stateable case in support of its contention for a repayment in respect of the CGT liability paid for 2004.

Conclusion



29. This hearing pursuant to section 933(1)(d)(iii) TCA 1997 is a hearing to enable the Commissioners determine whether to allow the Appellant's application for an appeal. While section 933(1)(d) is silent as to the criteria to be applied by the Appeal Commissioners in deciding an application thereunder, I am satisfied that in asking the Commissioners to permit an appeal to proceed to full hearing, the Appellant is required, *inter alia*, to demonstrate for the purposes of section 933(1)(d) that there is a *prima facie* stateable case to be heard and determined in the substantive appeal. This is a low legal threshold and is likely to be met in most cases. The Respondent may not refuse an appeal on the grounds that an Appellant is more likely to lose their case than to win in the event the matter proceeds to a substantive hearing; rather, in order to properly refuse an application for an appeal on this ground, the Revenue Commissioners (or, on appeal, the Appeal Commissioners) must be satisfied that even if the facts alleged by the Appellant are assumed to be correct, the Appellant's case is unstateable and is bound to fail.

29. The Appellant in this case did not contend that there was a mistake or error in the 2004 tax return or that the CGT was not lawfully due and payable in respect of 2004. The submission on behalf of the Appellant was that the reduction of the assessment to nil by agreement pursuant to section 933(3) TCA 1997 lead to a repayment claim in relation to the CGT paid in respect of 2004. In effect the Appellant argued that the reduction of the assessment extinguished the 2004 CGT liability. The Appellant was unable to set out a statutory basis in support of this contention, nor did the Appellant contend that the alleged repayment claim constituted a term of the agreement pursuant to section 933(3) TCA 1997. In my view the Appellant did not make out an arguable/stateable case which would allow the Commissioners to determine that the appeal proceed to full, substantive hearing.

30. The grounds of refusal in respect of this appeal pursuant to section 933(1)(b) TCA 1997, are contained in the Respondent's letter of 17 June 2014. The Respondent's position was that the agreement pursuant to section 933(3) TCA 1997 acknowledged discharge of the CGT liability on behalf of the NAME REDACTED Settlement during the tax year of assessment 2004 and that the assessment dated 28 February 2011 was reduced to nil pursuant to said agreement and in recognition of the discharge of the CGT liability. The Respondent refused





the appeal on the basis that a claim for repayment pursuant to section 864 TCA 1997 did not arise.

31. For the reasons outlined above, I have determined that these are valid grounds for refusal.
32. The 2004 CGT liability in respect of the NAME REDACTED Settlement, arose in accordance with the provisions of the Taxes Acts and the liability as a matter of law pursuant to the TCA 1997, was not challenged by the Appellant. The agreement pursuant to section 933(3) acknowledged lawful discharge of that liability by the Appellant, on behalf of the NAME REDACTED Settlement, within the statutory time limits of the TCA 1997. The submission on behalf of the Appellant that the reduction of the assessment extinguished the 2004 CGT liability is not a submission I accept.
33. Accordingly the Respondent was correct to refuse the appeal pursuant to section 933(1)(b) TCA 1997 and I determine pursuant to section 933(1)(d)(iii) TCA 1997, that the application for an appeal be disallowed.

APPEAL COMMISSIONER

April 2016

